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No. 869

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

FELIX WALLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on July 16, 1969.

CITATIONS OF OPINIONS BELOW

The opinion of the District Court on Motion for Judgment of Acquital or New Trial, dated October 1, 1968. (App. p. 14a) Opinion of the Court of Appeals. (App. p. 30a) Opinion of the Court of Appeals denying Petition for Rehearing and Written Answer. (App. p. 31a)

JURISDICTION

The Judgment of the Court of Appeals was entered July 16, 1969. Order denying Petition for Rehearing

and Request for Written Answer entered September 17, 1969. On October 9, 1969, an Order was entered extending the time for filing a Petition for Writ of Certiorari to November 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR CONSIDERATION

1. Does an automobile which disappears in one state, eight (8) days prior to its appearance in an adjacent state, two hundred miles away, without proof or explanation of its custody, possession, control or whereabouts in the interim period of time, is still, at that time, moving as a part of, or constitutes interstate commerce?

2. Whether the failure of the trial court to give the jury in its charge any guide as to what constitutes "moving as interstate commerce," which is an essential element of the offense charged, constitutes plain error in the substance of the charge, giving the right to this Court to review the error and order a New Trial, even though no specific objection or exception was taken during trial thereto?

3. What constitutes "receive and conceal" within the meaning of Title 18 U.S.C., Sec. 2313?

4. Did the trial Court err, as a matter of law, in overruling Defense Counsel's Motion for Judgment of Acquittal or New Trial, when the evidence failed to show, beyond a reasonable doubt that the Defendant "received and concealed" the stolen property, in question, in the Western Division of the Southern District of Ohio; that the vehicle was "moving as interstate commerce" and thus the facts could not support a jury verdict of guilty to the charge?

5. Is it prejudicial to the rights of an accused, within the meaning of the "Due Process Clause" of the 14th Amendment to the Federal Constitution, for the trial judge

to refuse to excuse the jury, or hear legal arguments out of the presence of the jury, upon request of defense counsel?

6. Did the lower Courts ignore the mandates of Brady v. Maryland, 373 U.S. 83, by denying defense counsel's Motion for production of all evidence favorable to the Defendant, at the close of the Government's case or make in camera inspection, where it was shown that statements of seven (7) res gestae witnesses, not called by the government, were favorable to Defendant?

7. Does the sixth amendment right to Counsel and the "equal protection clause" of the fourteenth amendment include the right to "local" Counsel, where the rules in a district require appearance with "local" Counsel as mandatory?

8. Can the government claim privilege and refuse to disclose the whereabouts of a secret serial number that identifies an automobile, as stolen, at the trial, where such disclosure is essential to the Defendant's defense?

9. Does a bailee have the right to authorize, what would otherwise be, an unlawful search of property of another?

STATUTE INVOLVED

Sec. 2313, Title 18 U.S.C.

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Note: Defendant herein was charged with "receiving and concealing" under the above statute.

STATEMENT OF THE CASE

The case here presented for review commenced with the charging of the Defendant, by indictment (App. p. 4a) for "Receiving and Concealing" a stolen vehicle, moving as interstate commerce from Birmingham, Michigan to Dayton, Ohio, knowing the motor vehicle to have been stolen, in violation of Section 2313, Title 18 U.S.C. Defendant was arrested in Detroit, Michigan, waived removal hearing and appeared before the District Court for the Southern District of Ohio, Western Division, situated at Dayton, Ohio and entered a plea of not guilty March 29, 1968. On April 17, 1968, Defendant proceeded to trial on the merits, before a jury. On the evidence adduced at the trial, Defendant was found guilty as charged. The trial Court overruled a Motion for Judgment of Acquittal or New Trial October 1, 1968. Defendant was sentenced to four (4) years imprisonment October 24, 1968. Notice of Appeal was filed October 24, 1968. Order affirming the Judgment of the lower Court was entered July 16, 1969. Order denying Rehearing and Request for Written Answer entered September 17, 1969. Order denying Petition for Stay of Mandate and Execution of Sentence pending Application for Writ of Certiorari to U.S. Supreme Court, denied, and bond revoked October 10, 1969. Defendant is presently serving the four (4) years sentence.

Evidence at Trial:

Mrs. Margaret Kamence from Bloomfield Hills, Michigan, testified that Planned Management had leased a vehicle like the one in question to Mr. William Bennett, also of Bloomfield Hills, Michigan, March 3, 1967. She could only say that the car returned to them later was the same make and color as the car leased to Mr. Bennett.

(T. 11 and 12). She had never seen Defendant before going to Court.

Mr. William Bennett testified that he parked the car, in question, behind his apartment October 20, 1967 at about 12:45 A.M. He found that it was gone, after breakfast, the following morning. The car returned to him later looked like the car stolen.

Mr. William Gordan of Detroit, Michigan, testified that Alton Sheffield, his half brother, came to Detroit several times during the summer, 1967 to see about a good deal on a new Cadillac. Gordon introduced Sheffield to the Defendant through one Calvin Baines. Gordon knew nothing about the negotiations between the Defendant and Sheffield. (T-34)

William Weaver testified that he rode in the car, in question, one Sunday morning. Alton Sheffield was driving the car at that time. This was the first time he saw the car. He never saw Walls in the car. He never saw Walls driving a car in Dayton, even when he (Walls) was in the company of Sheffield and his wife there.

Alton Sheffield (Main Witness) testified that he first met Walls October 27, 1967. Then changed and said he had seen him before. Admitted that he told the agent a different story to implicate Walls, after he (Sheffield) was arrested (T-76 & 77 & 80) (T-86). Said he bought the car from Walls, but never paid any money. (T-84) Admitted he told the clerk at the Secretary of State's Office that he (Alton Sheffield) bought the car in question, in Massachusetts and drove it to Dayton, Ohio. (T-79) Admitted that he presented a false registration to the clerk. (T-79) Said he drove the car in Dayton. Says he never saw Walls receive and or conceal the car, in question, at Dayton, Ohio. Sheffield drove the car all the time he and Walls were in Dayton.

Andrew Ferraco – FBI Agent – said: T. 144

> "A. I don't threaten anyone. We must have spoken of some of the outcomes that could be involved if he tried to conceal that he knew that this was a stolen car, but I did not threaten to arrest him; no."

(The above was stated concerning Alton Sheffield)

C. Roosevelt Johnson (The Notary) testified that on 11-8-67, two (2) weeks after the alleged transaction, he could not identify a picture of Walls as being the man that came to his office 10-27-67 with Alton Sheffield. (T. 118 & 119) After talking with the Asst. District Attorney at the trial 4-18-68, he identified Walls in the Courtroom.

The government had statements from seven (7) other res gestae witnesses, whose testimony would have been favorable to the Defendant. These witnesses were not subpoenaed by the government. (T. 138-140) (T. 170-182) Defense Counsel had a quick glance at these statements while talking with Asst. U.S. Attorney.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. Does an automobile which disappears in one state, eight (8) days prior to its appearance in an adjacent state, two hundred miles away, without proof or explanation of its custody, possession, control or whereabouts in the interim period of time, is still, at that time, moving as a part of, or constitutes interstate commerce?

An examination of cases considering this question does not leave, for use, a clear rule or general principle of law as a guide. For example, the trial judge, in considering this question, on a Motion for Judgment of Acquittal or New Trial, stated as follows: (See App. p. 26a)

COURT: "I am interested in what is the period of time when a car disappears in one state and appears in another that you can say it is moving as interstate commerce?"

COURT: "The case I had referred to where it deals with the question of twenty-four hours in a state is found in 388 fed. 2d, 286, decided by the Eighth Circuit in January of this year.

Now, it goes on to talk about possession giving rise to permissible inference of interstate transportation of guilt knowledge. You are not relying upon that?"

MR. MAKLEY: "Your Honor, I can't, in that the charge was brought under Section 2313. I would be the first one to say that the proof at trial certainly does not show that FELIX WALLS himself got into this automobile and drove it to the Southern District of Ohio."

It's clear that the trial judge recognized that the law on this question is unsettled.

In *Schwachter* v. *U.S.*, 237 Fed. 2nd 640, 644 (6th Cir.) The Court said at page 644:

> "But its character of being a part of interstate commerce does not continue indefinitely after its transportation ends. After a period of time and depending on what is done with the car, it may no longer be correct to treat it as moving in interstate commerce. The acquisition of the car and later sale of it by a person who is in no way connected with the theft and transportation may be under such circumstances as to terminate its interstate character."

We believe that the principle, aforestated, and announced by the Court in the *Schwachter* case supra has applicability in the instant case; because the government presented no proof of who might have stolen the car, in question, at Bloomfield Hills, Michigan, and concedes

that Appellant was not involved in the transporting from Michigan to Ohio. (See App. pp. 24a-28a)

Then, in *Davidson* v. *U.S.*, 61 F. 2d 251 at page 255, (8th Cir.) the Court said:

> "Government in prosecution for receiving, concealing, and storing stolen motor vehicle moving in interstate commerce must allege and prove that the car was a part of interstate commerce when received by the Defendant."

In the instant case, the government claims that the Defendant was in the car at Dayton, Ohio, eight (8) days after its theft in Michigan. With this proof, the government had the affirmative burden of showing interstate character of the car at the time Defendant is alleged to have received and concealed it. This they did not do; therefore, the mandates of the *Davidson* case supra would be controlling. Without such a showing, Federal Jurisdiction could not attach. Further, such affirmative proof must establish guilt beyond a reasonable doubt.

Julian v. *U.S.*, (9th Cir.) 391 Fed. 2d 279
Morandy v. *U.S.*, (9th Cir.) 170 Fed. 2d 5
Jones v. *U.S.*, (9th Cir.) 378 Fed. 2d 340

We believe that, if this Court grants Certiorari, the issue herein raised will be resolved in favor of the Defendant-Appellant. Certainly so, if the decisions of the 9th Circuit are followed. For example, in *Julian* v. *U.S.*, 391 Fed. 2d 279, the Defendant was found sleeping in a car in Nevada that had been recently stolen in Texas. Defendant had some personal possessions of the true owner on his person at the time of his arrest. The Appellate Court said:

> "The conclusion from that, that Julian had possession of the car is not unreasonable. Perhaps it would satisfy a preponderance test. But where convicting

> presumptions are projected on possession, the evidence of possession ought to be very clear to satisfy the test of guilt beyond a reasonable doubt."

In the instant case, the evidence of possession, against the Defendant, was so weak that the trial judge asked the government attorney the following question on a Motion for Judgment of Acquittal or New Trial:

> "THE COURT: What was the evidence here with reference to him being in possession of the car? He denied it." (See App. p. 28a)

The evidence is clear, in the instant case, that the only person seen in possession of the car, in question, at Dayton, Ohio, was the government witness, Alton Sheffield. William Weaver, Sheffield's cousin, testified that all the time he saw the car in Dayton, it was in the possession of Alton Sheffield. Sheffield admitted that he told the clerk at the Secretary of State's Office that he, Sheffield, drove the car to Dayton, Ohio from Massachusetts. (T. 79) Certainly this statement is consistent with the fact that he had in possession a car bearing Massachusetts plates and registration, at the time of his arrest. Walls was nowhere around at that time. It would be grossly unjust to permit an obviously guilty person (Sheffield) exonerate himself and convict Walls on no credible or rational evidence, as was done in the instant case.

2. Whether the failure of the trial court to give the jury in its charge any guide as to what constitutes "moving as interstate commerce," which is an essential element of the offense charged, constitutes plain error in the substance of the charge, giving the right to the reviewing Court to correct the error and order a new trial, even though no specific objection or exception was taken during trial thereto?

HOLDING: YES

In considering the charge of the trial Court, as a whole, we submitted two (2) specific objections to the Court of Appeals on this issue, namely:

(a) The trial Court did not give the jury any guide concerning an essential element of the crime charged, that is, "Moving as interstate commerce. The Court simply told the jury on page 232 of the trial transcript:

> "(3) That said Cadillac was moving as interstate commerce from Birmingham, Michigan to Dayton, Ohio."

(b) On page 233, the Court told the jury: "In a criminal prosecution for receiving and concealing a motor vehicle, knowing it to have been stolen is an essential element of the crime and it must be shown by a *Preponderance* of the evidence in order to establish the guilt of the accused." (Emphasis added) (See *Julian* v. *U.S.*, 391 Fed. 2d 279)

We believe that both errors, complained of herein, are so patently prejudicial that they should be treated as "plain errors" requiring reversal, even though no specific objection or exception was noted at the trial.

The Defendant in this contention, or portion of his argument, directs the attention of this Court to the per-

tinent matters contained in the charge of the trial Court, to the trial jury (App. p. 12a), primarily concentrating his attention to that part of the charge of the Court concerning one of the material elements contained in the indictment and to be proven by the prosecution beyond a reasonable doubt, to-wit: That said Cadillac was moving as interstate commerce from Birmingham, Michigan to Dayton, Ohio.

Defendant contends that as is indicated by the reproduction of the charge as contained in the Appendix, referred to hereinabove, that the Court in its charge on this element materially and substantially violated the rights of this Defendant to have given to the jury of his peers an instruction which does not adequately instruct the jury on all essential questions of law involved in the case, whether requested or not.

(See Criminal Procedure under the Federal Rules by Lester B. Orfield (1967) Section 30:12 at Page 33, citing *Kreiner* v. *U. S.* (1926, 2d C.C.A.-New York) 11 Fed. 2d 722, 731.)

In 1942, Judge Vinson stated:

> "It is almost, if not, as important to a Defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers." (*Williams* v. *U. S.* (1942) 76 App. D. C. 299, 131 Fed.)

To illustrate the importance of the charge to the jury, primarily in a criminal case, Justice Frankfurter of the United States Supreme Court stated:

> "Charging a jury is not a matter of abracadabra . . . The charge is that part of the whole trial which probably exercises the weightiest influence upon the jurors. It should guide their understanding after jurors have been subjected to confusion and deflection from the relevant by the stiff partisanship of counsel." (See

Andres v. *U. S.* (1948), 333 U.S. 740, 68 Sup. Ct. 880.

In conjunction therewith, Defendant contends is Rule 52 of the Federal Rules of Criminal Procedure, 18 United States Code Annotated, which rule concerns itself with harmless error and plain error and which in substance is as follows:

> "(A) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
> (B) Plain error. Plain errors are defects affecting substantial rights and may be noticed although they were not brought to the attention of the Court."

Defendant says that in the case at bar, counsel for the defense failed to object or take exception to the charge of the Court, but that inasmuch as the failure of the trial Court in its charge to give any guide to the jury as to what constitutes the essential and material elements of "moving as interstate commerce," that this constitutes plain error in the substance of the charge, and gives rise to a right to this Court review the error and order a new trial. That it has been held that Rules 30 and 52 (B) are to be construed together and it is recognized law that ordinarily errors in the charge of the Court are not open to review on appeal unless the matter was brought to the attention of the trial Court by exception as required by Rule 30, but that notice may be taken of grave error, which amounts to the denial of a fundamental right of the accused even though no exception was taken. (See Criminal Procedure under the Federal Rules by Lester B. Orfield (1967) Section 52:35 at Pages 490 and 491, citing *United States* v. *Roviaro,* 379 Fed. 2d 911).

Defendant says that the issue raised by this argument is

not a mere phantom issue and is not an overt attempt to divert the Court's attention from the failure of counsel to take objection or exception to the charge of the Court, but rather is an argument going right to the heart of the whole issue involved. That the consideration of assuring an accused a fair trial prevails over the important policy of having counsel point out error immediately, . . . Even though no objection has been made to the instructions, if error is basic and highly prejudicial, the appellate Court may give effect to the plain error rule, and review the error . . . (See Criminal Procedure under the Federal Rules by Lester B. Orfield (1967) Section 30:55 at Page 84, citing *U. S.* v. *Lawson,* 337 Fed. 2d 800 and *Polansky* v. *U. S.,* 332 Fed. 2d 233).

To illustrate this point of the failure of a court to adequately and properly instruct and guide a jury concerning a material element of the indictment, in a criminal case, Defendant cites to the Court the case of the *United States* v. *Lang* (1956) 239 Fed. 2d 676, which was a prosecution for receiving and concealing stolen automobiles in interstate commerce, knowing the cars to have been stolen. In that case, the Court reached a conclusion concerning the matter of interstate commerce and failed to instruct the jury and allow the jury to make that decision as to whether the automobiles in question were moving, as, and were a part of, interstate commerce when Defendant received and disposed of them. The court held that the error of the trial judge in the substance of the charge was so fundamental that they had to order a new trial despite the fact that no specific objection was taken by Defendant's Counsel to the language quoted. The court having determined this vital issue of fact, the appellate court reversed the conviction of the Defendant, using much the same reasoning as can be found in the case of *Barfield*

v. *United States* (1956, 5th C.C.A. — Alabama) 229 Fed. 2d 936 at Page 939 where the court in a prosecution for interstate transportation of a stolen automobile, which Defendant had been driving at the time of a collision, said there was an inadequate and misleading charge to the jury where there was no guide as to what constituted the item of possession. This court also threw out the presumption that the possession of recently stolen goods raised a presumption of guilty knowledge. (See also Criminal Procedure under the Federal Rules by Lester B. Orfield (1967), Section 52:46 at Page 499.)

Let us suppose that in the case at bar, Defendant would agree that the jury had the right to make the determination of fact as to whether the car, when allegedly received and concealed by the Defendant, was still moving in or was a part of interstate commerce. How in our case could the jury make the determination of the material fact of interstate commerce if it does not know or understand the meaning of this concept of the law? Inasmuch as juries are constituted of lay people, without legal experience, it would be mere folly and guesswork on their part to make such a legal determination without a full, adequate and proper definition and instruction to them on what legally constitutes this concept of interstate commerce.

This question was considered by this court in the case of *Schwachter* v. *United States,* cited previously herein, where the Judge in his charge said that the sole issue was:

"Whether the Defendant knew the car was stolen."

In that case the appellant excepted to the charge of the court to the jury for failure to submit the issue regarding interstate commerce to the jury and the judgment of conviction was reversed. The point, of course, is that in the *Schwachter* case, the Court was again dealing with a ma-

terial element of the indictment, the instruction upon which was mishandled by the Court, and the Court found that to be sufficient ground upon which to reverse the conviction of the Defendant as rendered in the low court.

It is also important to point out to the Court that there was a dichotomy in the charge of the trial Court to the jury (App. 8 and 9) in that the Court originally charged the jury that knowledge of the Defendant that the motor vehicle was stolen must be proved beyond a reasonable doubt, yet later the Court instructed:

> "Knowing it to have been stolen is an essential element of the crime and it must be shown by a *preponderance* of the evidence in order to establish the guilt of the accused . . ." (Emphasis added)

It has been held that where the instruction contains an error in the substantive law applicable to the offense, this may be reversible error . . . In 1927, Justice Brandeis pointed out:

> "Even in civil cases erroneous rulings especially those embodied in instructions, are presumptively prejudicial." (See Criminal Procedure under the Federal Rules by Lester B. Orfield (1967), Section 30:36 at Pages 63 and 64, citing *Burns* v. *U. S.* (1927) 274 U.S. 328, 47 Sup. Ct. 651.)

See also:

Julian v. *U. S.*, 391 Fed. 2d 279
Morandy v. *U. S.*, 170 Fed. 2d 5
Jones v. *U. S.*, 378 Fed. 2d 340

3. What constitutes "receive and conceal" within the meaning of Title 18 U.S.C., Sec. 2313?

To this question, the trial judge said; (App. p. 28a)

> "The Court: Are there any cases under this receive and conceal? I haven't found any. I wonder if there were."

The government attorney informed the Court that his understanding of "receive and conceal" meant simply, unlawful possession. The Court then said;

> THE COURT: "What was the evidence here with reference to him being in possession of the car? He denied it." (See App. p. 28a)

To this issue, we submit the following questions, which can not be answered or resolved by any evidence presented in the instant case;

(a) Who did the Defendant *receive* the stolen car from?

(b) Where did he receive the stolen car? (The most logical guess would be Michigan where he lived and the situs of the theft. Then charges should have been brought in Michigan.)

(c) When did he receive it, and under what circumstances?

(d) When, and how did he conceal it in the Southern District of Ohio?

The Witnesses for the government said:

(T. 51) William Weaver said he never saw Defendant in the car, in question at Dayton, Ohio.

(T. 61) Alton Sheffield said Defendant never went into the Ohio Title Office.

(T. 64) He, Sheffield, had all papers to the car.

(T. 65) Defendant never received any money for the car.

(T. 78) Sheffield, told the clerk at the title office that he, Sheffield, not Walls, bought the car in Massachusetts and drove it to Dayton, Ohio.

(T. 90) He never saw Walls attempting to hide the car.

(T. 118) C. Roosevelt Johnson says he could not identify the Defendant November 8, 1967 as being a party involved in the attempted sale of the car October 27, 1967.

(T. 196) Defendant denied delivering the car to Sheffield.

We submit that it would be wholly unreasonable to conclude, from the above stated evidence, that Defendant "received and concealed" the stolen car, in question, in Dayton, Ohio. Therefore, we pray that this Court will grant certiorari to correct this error.

4. Whether the Court erred, as a matter of law, in overruling Defense Counsel's Motion for Judgment of Acquittal or New Trial, when the evidence failed to show, beyond a reasonable doubt that the Defendant "received and concealed" the stolen property, in question, in the Western division of the Southern District of Ohio; that the vehicle was "moving as interstate commerce" and thus the facts could not support a jury verdict of guilty to the charge?

HOLDING: YES

In support of the concluding portion of the brief submitted herein by the Defendant, he contends that the Court erred, as a matter of law, in overruling defense counsel's motion for a judgment of acquittal or new trial (App. p. 14a) when the evidence produced at trial failed to show beyond a reasonable doubt that the Defendant received and concealed stolen property in the Western Division of the Southern District of Ohio, that the vehicle was moving as interstate commerce, and that by virtue thereof, such evidence could not support a jury verdict of guilty of the charge as contained in the indictment.

Defendant does not question the fact that the present state of the law requires that factual matters be considered and determined by the jury. (See *Schwachter* v. *U. S.* (1956, 6th C.C.A.), 237 Fed. 2d 644.) However, Defendant says that where there are not facts from which to conclude that the vehicle in question was still in interstate commerce when allegedly received and concealed by the Defendant, nor is there any testimony to indicate the receipt or concealment of the stolen article in the jurisdiction of the Court in which he is tried, that reasonable minds can come but to one conclusion and that this is not a matter to be considered by the jury.

It has been held that one charged with the violation of former Section 408 (now 18 United States Code Annotated, Section 2312) of this title by selling a stolen automobile may be lawfully tried only in the state and district where the sale occurred. (See *Ventiniglia* v. *Aderhold* (D.C. Georgia-1931) 51 Fed. 2d 308.)

As indicated by the excerpts of testimony contained in the Appendix on Pages 5a through 12a, not one witness who testified in the lower court, could indicate the whereabouts of the motor vehicle, nor its custody, possession or control during the eight (8) day period from the time of its theft until it was seen in Dayton, Ohio. Nor could any of these witnesses state either when or where the Defendant received the motor vehicle in question. It is elementary, therefore, to conclude that from such testimony, it would be impossible either to conclude by circumstances, as well as by direct proof, knowledge on the part of the Defendant as to whether or not the vehicle in question was, in fact, a stolen automobile. Although Defendant admits that the status of the law appears to be that the possession of recently stolen property, when unexplained, permits an inference to be drawn that the Defendant knows

that the property is stolen, this inference can only be drawn upon facts which will support such an inference. (See *Schwachter v. U. S.* (1956), 6th C.C.A. 237 Fed. 2d 643.)

Therefore, Defendant must conclude that the overruling of the motion for a directed verdict (App. p. 16a) by the trial Court was obviously erroneous. Such motions for judgment of acquittal or new trial have even been sustained and upheld before the conclusion of the government's case. (See *Fong Foo* v. *U. S.* (1962), 369 U.S. 141, 82 Sup. Ct. 671.)

5. Is it prejudicial to the rights of an accused, within the meaning of the "Due Process Clause" of the 14th Amendment to the Federal Constitution, for the trial judge to refuse to excuse the jury, or hear legal arguments out of the presence of the jury, upon request of defense counsel?

HOLDING: YES

(See Motion Transcript pp. 3 & 4, App. p. 22a)

> "Mr. Rice: The second item that we submit to the Court that we objected to the procedure used by the court in requiring that we state to the Court Reporter our objection to certain questions or certain other arguments that we had during the course of the trial."
>
> "The Court: You can skip that. We do that here all the time."

The procedure required by the Court directed Counsel to relate an objection or Motion to the Court Reporter. She would then read Counsel's argument to the judge. He would then rule. All the time, the jury is sitting in the box, close enough to hear and see what's going on. Defense Counsel objected to this procedure, but was overruled.

We believe that the aforestated procedure impaired the Defendant's right to a fair trial. My experience, as a trial lawyer for nine (9) years, has taught me that it is always prejudicial for a jury to know how the judge is ruling. Most lay people try to go along with the judge.

In the instant case, the Motions to be argued for judgment or acquittal were in substance, the same argument proposed to the jury; viz, that there was no evidence upon which the jury could find Defendant guilty. The Court had ruled against the Defendant on the same argument, before the jury. Defense Counsel asked the Court to excuse the jury or hear arguments in chambers so that they would not know what the Court's decision would be. This request was refused.

We submit that the mandates of fundamental fairness, inherent in our system of jurisprudence, compels this Court to correct this error.

6. Did the lower Courts ignore the mandates of Brady v. Maryland, 373 U.S. 83, by denying defense counsel's Motion for production of all evidence favorable to the Defendant, at the close of the Government's case or make in camera inspection, where it was shown that statements of seven (7) res gestae witnesses, not called by the government, were favorable to Defendant?

HOLDING: YES

(T. 122 & 123) Defense Counsel made demand for statements of witnesses to be produced as evidence favorable to Defendant, citing *Brady* v. *Maryland,* 373 U.S. 83, as authority for such demand. The Court declined to rule and promised to do so later.

(T. 170-180) Demand for evidence favorable to Defendant renewed. (T. 170-180) Request denied by the Court.

This Court said, through Mr. Justice Douglas, in *Brady* v. *Maryland*, 373 U.S. 83 at page 87:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

In the instant case, the government failed to call seven (7) witnesses that could possibly exonerate the Defendant; namely, six identifying witnesses and a handwriting expert. Defense Counsel saw their statements, but was not permitted to obtain their addresses etc. so that they could be subpoenaed in as Defense Witnesses. Justice and fundamental fairness requires that we be given an opportunity to bring those witnesses in for the Defendant. We conclude this argument with the words of this Court in the Brady case Supra:

> Page 87: "The principle of Mooney vs. Holohan is is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the Courts.' A prosecution that withholds evidence on demand of an accused which, if made available would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the Defendant."

7. Does the sixth amendment right to Counsel and the "equal protection clause" of the fourteenth amendment include the right to "local counsel," where the rules, in a district, require appearance with "local counsel" as mandatory?

HOLDING: YES

In the instant case, Defendant alleged, by affidavit, that:

> "That he was denied his right to local counsel in the lower Court, pursuant to then existing Court rules, by artifice and scheme, as a result of personal feelings against Counsel of his choice; that he was not thereafter offered appointed Counsel to replace retained Counsel; that he had retained the services of Mr. Keith A. Saeks, Esq. of Dayton, Ohio as local Counsel to assist in the defense of his case and paid one half of the quoted fee, the balance to be paid at trial; that within a week of trial, Roger Makley, U.S. Attorney, informed foreign Counsel that the Court waived the requirement to have local Counsel in Deponent's case; this waiver was discussed with local Counsel and for the first time Deponent learned that possible ill feelings existed against local Counsel and he declined to appear at trial, leaving Deponent without local Counsel as required in all cases heard by the lower Court." (See App. p. 18a)

The aforestated allegations, in the Affidavit, were never denied in the Court of Appeals. They must be accepted as true before this Court. If true, then, should this Court order a new trial to correct the injustice to the Defendant? We believe that the necessity of fair play and due process in our Courts require it.

We concede, that all cases we have been able to find, concerning an accused's right of Counsel have considered situations where the right of Counsel was the issue, to resolve, or whether the accused had the benefit of effective

Counsel; without categorizing Counsel as "local" or otherwise. We believe our situation, in the instant case, would fall in the latter category; viz, ineffective Counsel.

We believe that the sixth amendment right to Counsel, coupled with the "equal protection clause" of the fourteenth amendment, includes the right to have "local" Counsel in a jurisdiction requiring the assistance of local counsel as mandatory. Otherwise, any Defendant without local Counsel would be denied a right granted to those Defendant's with local Counsel.

As this Court said through Mr. Justice Douglas in *Douglas* v. *California,* 372 U.S. 353:

> "There is lacking (in this procedure) that equality demanded by the fourteenth amendment where the rich man, who appeals as of right, enjoys the benefit of Counsel's examination into the record, research of the law and marshaling of arguments on his behalf, while the indigent, already burdened with a preliminary determination that his case is without merit, is forced to shift for himself."

While, in the instant case, there is no claim of indigency, I think the reasoning in the instant case would be the same as that employed in the *Douglas* case, supra, in weighing whether the Defendant herein, was denied equal protection of the laws. We say he was so denied where the local law requires that every Defendant appearing before the Court *must* have local counsel.

Does the trial record show that Defendant was expressly denied local counsel? We concede that it does not so reflect, as do many things in trials, such as attitudes etc., of a prejudicial nature do not appear in the printed record. However, we submit that rights can be suppressed by omission or commission. The Defendant's Affidavit hereto attached, tells the story here, as well as in the Court of

Appeals. (See App. p. 18a) Since said allegations are not denied, they must be deemed true. If so, then, do they support our claim that Defendant was denied effective assistance of Counsel? I believe that any Court in this country would agree that he was.

When foreign Counsel, who had represented Defendant in removal proceedings at Detroit, Michigan, and Defendant appeared for arraignment on the Indictment March 29, 1968, the Court set the trial date for April 17, 1968, and advised that every Defendant appearing before the Court *must* have local Counsel under the Court's rules. Pursuant thereto, Defendant secured the services of Mr. Keith A. Saeks, Esq. of Dayton, Ohio. After Mr. Saeks noticed his appearance, we received a call from the United States Attorney, saying that the judge said Defendant could appear *without* local Counsel. Upon investigation, we discovered that Counsel of our choice was unpopular with the Court for *personal* reasons, which had caused Mr. Saeks to be indicted on criminal charges and severely audited by internal revenue, after the jury found him not guilty of the criminal charges, before the same judge. When Mr. Saeks, our local counsel, heard about the call from the U.S. Attorney, he declined to appear before the Court, and we were without local counsel within a week of trial.

The Sixth Amendment to the constitution grants an accused the right to counsel of his choice, if he can so afford. In the instant case, we retained Mr. Saeks, but were deprived of his services because of personal matters, not involving the Defendant, at a time when we could not secure other local counsel and prepare for trial. Since the local rules required that *all* Defendants *must* have local counsel, Defendant was entitled to the assistance of local counsel, even if the Court had to appoint one.

Both Defendant and counsel, appearing were residents

of Detroit, Michigan, and were unfamiliar with Dayton, Ohio. By hindsight, we know that the assistance of local counsel was imperative to a fair trial, in this case. The government attorney only brought in those witnesses favorable to their prosecution against the Defendant. Other witnesses who could not identify the Defendant, including Sheffield's wife, and whose testimony was favorable and could exculpate Defendant, were not called to testify and their whereabouts secreted from defense counsel. Also, defense counsel needed the use of a local office to prepare "requests to charge" and other materials during the trial. In this respect, the trial Court denied defense counsel's oral requests to charge. (See T. 225. Cases cited *Whenstead* v. *Hildebrandt,* 159 Fed. 2d 25; *Dunn* v. *U.S.,* 318 Fed. 2d 93)

8. Can the prosecution claim privilege and refuse to disclose the whereabouts of a secret serial number that identifies an automobile as stolen, at the trial, where such disclosure is essential to the Defendant's defense?

In this case, neither of the identifying witnesses, Mrs. Kamenec and or Mr. Bennett, could specifically identify the car, in question, as the one stolen 10-20-67. They could only say it looked like the same one by color and equipment. Whether this was the stolen car was an essential element of proof at trial. Defendant would have the right to examine these proofs, because, if we could show that this was not the stolen car, there would be no case.

In this respect, the government agent was asked; (T. 142 & 143).

Q. Now, where did you say this number here came from?

A. From the 1967 Cadillac that is in question.

Q. Whereabouts on the Cadillac?
THE COURT: What exhibit are you talking about?
MR. RICE: Twelve.
Q. Whereabouts on the Cadillac?
A. You want the exact location?
Q. If you know.
A. I know, but I am not at liberty —
MR. MAKLEY: I ask to approach the bench.
(Discussion had off the record at the bench)
THE COURT: Sustain any objection. Those are secret numbers on automobiles.

(T. 128 Agent characterized secret number as being "Confidential")

By suppressing the foregoing cross-examination, the Court put defense counsel in a position wherein we had to accept the hearsay testimony of the agent that the car in question was stolen, without being able to examine this evidence ourselves, to determine if this testimony was true. Certainly this was prejudicial to the Defendant's right to a fair trial.

In considering the question of privilege to conceal the identity of an informant in *Roviaro* v. *U.S.*, 353 U.S. 53, Mr. Justice Burton said:

> "A further limitation on the applicability of the privilege arises from the fundamental requirement of fairness. Where the disclosure of an informer's identity, or the contents of his communication is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege must give way."

We believe that the principle announced in the *Roviaro* case, supra, is stronger than any consideration in the instant case, in that, the *Roviaro* case involved the identity of a person, whose life would be at stake; while the in-

stant case involved identifying property. We do not believe that a refusal to identify property, which is the subject matter of litigation, can be claimed as a privilege, so as to bar Defendant's right to cross-examine testimony relative thereto. Also, concealing this information, prevents an accused from making an independent physical examination of the property to determine whether it is the stolen property in question.

We submit that the lower courts have suppressed the Defendant's right to cross examine on an essential element of the crime herein charged, and this Court should grant a new trial to correct this error.

9. Does a bailee or custodian have the right to authorize, what would otherwise be, an unlawful search of property of another?

In the instant case, the agents knew about the suspected car several days before they made a search. (See T. 126) On T. 143 & 144 the agent was asked:

> Q. Now, before you examined that car, did you obtain a search warrant from the court?
> A. No, sir.

In the instant case, the Defendant was in no way connected with the suspected crime until after a search was made 11-2-67. The search was made without probable cause or authority of law. Thereafter, Sheffield was requestioned and shown a picture of the Defendant. He changed his story and implicated the Defendant.

The essential prerequisite to a valid search and seizure without a warrant is a valid arrest. (See Const. Limitations on Evid. in Crim. Cases p. 11) The record is clear, in the instant case, that prior to searching the car, nobody had been arrested. Also, there were no reports or other

information available to the agent that would cause him to believe the car to be stolen; except possibly the fact that the clerk at the Registration Office called them because Sheffield was trying to register the car without a Massachusetts bill of Sale. The officers had no probable cause or reason to search the car in question without a warrant. They had plenty of time to secure a warrant, before making the search. The car was called to their attention 10-31-67, the search was made 11-2-67.

In *Beck* v. *Ohio,* 379 U.S. 89, this Court held that a search cannot be the basis of an arrest. A search is not justified by what it turns up. (See Const. Limitation Evid. in Crim. Cases p. 14). In the instant case, would anyone have been arrested had all serial numbers been the same? Obviously not, because all other papers were genuine and in order with all apparent serial numbers, except the alleged secret number.

Since the Defendant was not the possessor of the car at the time it was seized and searched, can he raise the illegality of the search as a defense? We believe he can under the authority of *Jones* v. *U.S.,* 357 U.S. 493 (1958).

The agent testified that Sheffield consented to let them seize and search the car. Sheffield says that he had possession of the car with Walls' permission until the sale price was paid. If so, then, he would simply be a bailee until the price was paid. As such, could he authorize an illegal search of the car of another? We do not believe so. This court held in *Chapman* v. *U.S.,* 365 U.S. 610 (1961), and *Stoner* v. *California,* 376 U.S. 483 (1964), that a landlord or hotel manager is without power to give a valid consent to the police to enter and search a room or other part of the premises which he has rented to a Defendant.

We are asking this Court to hold that the search of the automobile in question was illegal and the evidence in connection therewith should have been suppressed.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ WILFRED C. RICE

2436 Guardian Building
Detroit, Michigan 48226

Attorney for Petitioner

APPENDIX

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Relevant Docket Entries

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
AT DAYTON

Case No. 4641

UNITED STATES OF AMERICA

vs.

FELIX WALLS

RELEVANT DOCKET ENTRIES

1-25-68	Indictment filed.
3-29-68	Defendant appeared in open Court by counsel and entered a plea of not guilty. Matter continued. Bond continued.
4-17-68	Trial commenced . . . jury impaneled and sworn. Opening statements. Plaintiff's testimony . . . trial not complete. Adjourned . . .
4-19-68	Trial continued . . . charge to the jury . . . jury retired and returned a verdict of Guilty . . . bond revoked and defendant remanded to U. S. Marshal. Verdict filed.
4-26-68	ORDER, defendant to be released on $5,000.00 OR bond filed. Bond executed and defendant released . . .
4-25-68	Defendant's motion for a new trial with memo and notice filed.
9- 9-68	Transcript of trial proceedings filed.
10- 1-68	ORDER, Defendant's motion for judgment of

acquittal or new trial are denied. Defendant to appear on October 24, 1968 for sentencing filed. Copy mailed to counsel for Defendant.

10-24-68 Defendant appeared in open Court for sentencing. SENTENCE – FOUR (4) YEARS. Judgment and Commitment issued this date.

10-24-68 Defendant's notice of appeal filed.

INDICTMENT

(Section 2313, Title 18, USC)

(Filed January 25, 1968)

The Grand Jury charges:

On or about October 27, 1967, FELIX WALLS, in the Western Division of the Southern District of Ohio, did receive and conceal a stolen motor vehicle, that is, a 1967 Cadillac DeVille, serial #B 721 7146, which was moving as interstate commerce from Birmingham, Michigan to Dayton, State of Ohio, and he then knew the motor vehicle to have been stolen, in violation of Section 2313, Title 18, United States Code.

A TRUE BILL

/s/ CHARLIE COWLS
Foreman

ROBERT M. DRAPER,
United States Attorney

ROGER J. MAKLEY,
Asst. United States Attorney

Testimony of William Bennett

TRANSCRIPT OF PROCEEDINGS

at Dayton Ohio on
April 17, 18, & 19, 1968

(Filed September 9, 1968)

BEFORE: His Honor, Carl A. Weinman, Judge of said Court at a duly impaneled jury.

* * *

[14] **William Bennett**

being called as a witness in behalf of the government, first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY: MR. CHARLES DERSOM: * * *

[15] Q What type automobile was it?
A A Cadillac sedan DeVille.
Q What year and model?
A 1967 this particular car was, yes. * * *
Q Did you use the car on October 19th, 1967?
A Yes. That was on a Thursday.
Q Did you bring the car back to your residence then on October 20th?
[16] A Yes. * * *
Q So that would have been on the morning of October 20th?
A Right.

* * *

Q When you woke up in the morning did you come out to your car?
A After breakfast?

Q Yes. Was it there?

A It was not there.

* * *

CROSS-EXAMINATION

* * *

[18] BY: MR. WILFRED C. RICE:

* * *

[22] Q Now, have you ever seen this young man here before?

A No, sir.

Q Have you ever seen him around Bloomfield Hills?

A Not to my knowledge.

* * *

[41] **William Weaver**

Being called as a witness in behalf of the government, first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY: MR. CHARLES DERSOM:

* * *

[49] Q When was the next time you saw Felix Walls?

A About two weeks later down to the Dayton Union Station on Sixth Street.

* * *

Q Where did you see Felix Walls there, what was he doing?

A He was on the telephone when I saw him.

* * *

[50] Q Have you ever ridden in a car that is in question in this case?

A Beg pardon.

Q Did you ever ride in the car that is in issue in this case?

A No, no. Unless Sunday morning after Alton had the car, I rode in it Sunday afternoon after came from church.

Q What kind of car was that that you rode in with Alton?

A Well, it was a chocolate, it had a vinyl top.

Q What make, what year, do you recall?

A Well, it was a '67 Sedan DeVille.

Q What make?

A Cadillac.

* * *

CROSS-EXAMINATION

BY: MR. WILFRED C. RICE:

[51] Q Mr. Weaver, you say that the first time that you saw this chocolate colored car was when Alton Sheffield was driving that car on Sunday morning; is that correct?

A Yes.

Q Now, you never at any time saw Felix Walls in that chocolate colored car that you are talking about, did you?

A No, I didn't see him in the car.

Q When you say that you saw Sheffield's wife and Felix Walls near the station, where you were, Walls was on the telephone at that time; is that correct?

A Yes.

Q And you never heard anything that Walls said at that time?

A No.

* * *

[57] Q Now, when you saw him in the company of Mr. Sheffield and his wife and two other persons that you spoken about, was he driving a car at that time?

A No, he wasn't driving. He was on the telephone.

Q So then it would be a fair statement, would it not, Mr. Weaver, that you never at anytime saw Felix Walls driving a car here in the City of Dayton?

A No.

* * *

[58] Q Now, this white Cadillac that you were talking about, that you saw on the 27th of October, you never saw Felix Walls in that car either, did you?

A No.

* * *

[59] **Alton Sheffield**

Being called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY: MR. ROGER MAKLEY:

* * *

[60] Q Mr. Sheffield, do you know the defendant, Felix Walls?

A Yes.

* * *

Testimony of Alton Sheffield

Q When did you first meet Felix Walls?

A On or about the 27th of October, 1967.

Q Where did you meet him?

A Why I met him in at my home. Previously I met him downtown at the Stratford House on First Street.

* * *

[61] Q What happened after you got down to the Stratford House?

A When I got to the Stratford House, I looked for a '67 Cadillac and I saw it parked in a driveway to a parking lot and so I assumed it was him and blew my horn and he backed out and followed me to my house.

Q Why did you assume it was him in the '67 Cadillac?

A Because he was supposed to bring me a '67 Cadillac down.

* * *

[64] Q The car you have reference to, what car is that?

[65] A The '67 Cadillac DeVille that was brought down from Detroit.

Q You took the car then?

A Yes.

Q Did you pay Felix Walls any money for that car?

A No.

Q How is that you took the car and didn't give him any money?

A Well, I told him to get a loan on the car, I would have to show the finance company the car, and in order to do this it was too late in the afternoon to go to the bank to show the car so it would have to be Monday morning because this was Friday.

Q Is that the last time you saw Felix Walls on October 27, 1967?

A Yes.

Q Did you see Felix any time after October 27, 1967?

A No.

• • •

[89] CROSS-EXAMINATION

BY: MR. WILFRED C. RICE:

Q You at no time saw Felix Walls receive this car from anyone in Dayton, did you?

A No.

Q You didn't see him trying to hide it either, did you?

[90] A Nope.

• • •

[91] Q Now all the time that you were in Dayton here together, you drove the car, didn't you?

A Right.

Q Now, what inquiry did you make when you saw this man here who has been representing himself as Phil and Felix when you saw him sign the name down there Wilbur Parker?

A I didn't inquire at all because I didn't know what his name was.

Q Well, you knew it wasn't Wilbur, didn't you?

A No, I did not.

• • •

1. Alton Sheffield

[T. 76] "Q Now, I believe you testified on direct examination that when the FBI contacted you over at the Title Registration Bureau that you told them what you told us here today about this incident; is that correct?

"A Well, I told them another story about that.

"Q Oh! What story did you tell them the first time they talked with you?

"A The first time I told them that I met a guy in a Club and had gotten the car from him.

"Q What else?

"A Told them that I paid $1300 down and had a balance of $3700 to pay.

[T. 80] "Q Now, it wasn't until after the FBI had taken you down to their office and questioned you and indicated to you that you were in trouble that you told them that Felix Walls or a person by the name of Felix was the one that gave you the car, isn't that true?

"A This is true."

2. **Andrew Ferraco — FBI Agent**

[T. 144] (concerning Alton Sheffield)

"Q Did you intend to arrest him or did you?

"A No, he was never arrested.

"Q Never had been arrested?

"A No, sir.

"Q Did you ever threaten to arrest him?

"A I don't threaten anyone. We must have spoken of some of the outcomes that could be involved if he tried to conceal that he knew this was a stolen car, but I didn't threaten to arrest him; no.

3. **Roosevelt Johnson** (concerning identity of Defendant)

[T. 109] "Q Now, do you see in the Courtroom here today the individual who signed that Bill of Sale, Wilbur Parker?

"A Yes I do.

"Q Where is he?

"A Sitting over there.

"MR. MAKLEY: Let the record show that the witness has identified the Defendant, Felix Walls.

[T. 118] "Q Now, isn't it a fact, Mr. Johnson, when you talked with the FBI Agent on November 8, 1967, you told the Agent at that time that you could not identify the pictures of Felix Walls, isn't that true?

"A That is my belief.

[T. 119] "Q Now, isn't it a fact that the FBI came out and threatened your position as a Notary Public if you didn't change your story?

"MR. MAKLEY: Objection.

"A No; no; no."

* * *

[226] **CHARGE**

* * *

[232] Now, the government must prove some essential elements of this crime beyond a reasonable doubt. And I would like to call your attention to these essential elements.

(1) That the defendant, Felix Walls, did receive and conceal a motor vehiclie, a Cadillac automobile;

(2) That the defendant did so with unlawful and fraudulent intent;

(3) That said Cadillac was moving as interstate commerce from Birmingham, Michigan to Dayton, Ohio;

(4) That Felix Walls did commit said act knowing that the [233] motor vehicle, the Cadillac, was stolen; and

(5) That the offense charged was committed on or

about October 27, 1967 in the Western Division of the Southern District of Ohio.

The government must prove each of these essential elements. And if the government fails to prove any one of those five elements your verdict must be for the defendant . . . In a criminal prosecution for receiving and concealing a motor vehicle, knowing it to have been stolen is an essential element of the crime and it must be shown by a preponderance of the evidence in order to establish the guilt of the accused . . . Now, [234] that briefly, ladies and gentlemen, is your duty to determine whether Felix Walls did receive and conceal a Cadillac moving in interstate commerce knowing the said Cadillac was stolen . . .

* * *

JURY VERDICT

(Filed April 19, 1968)

We, the Jury herein, do find the Defendant, Felix Walls, GUILTY in manner and form as charged in the Indictment herein.

4-19-68
(Date)

/s/ LEON G. FRY
(Foreman)

MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

(Filed April 25, 1968)

Defendant, by his attorney, WILFRED C. RICE, moves this Honorable Court for Judgment of Acquittal or New Trial pursuant to Rule 29 (c) and 33 Federal Rules of Criminal Procedure for the following reasons:

1. That the verdict of "guilty as charged" returned by the jury April 19, 1968, is clearly erroneous and can in no way be sustained on the evidence presented, as a matter of law. The record is barren of one scintilla of evidence that would show that the defendant "Received" and/or "Concealed" a stolen 1967 Cadillac in the Southwestern District of Ohio as charged in the indictment, knowing the same to be stolen.

Doherty v. *U. S.*, 193 F. 2d 487 at page 489
Phillips v. *U. S.*, 206 F. 2d 923
Wolf v. *U. S.*, 36 F. 2d 450
Davidson v. *U. S.*, 61 F. 2d 250
Seefeldt v. *U. S.*, 183 F. 2d 713, 715

2. That the defendant's right to a fair trial was impaired by the Court's refusal to hear Motions and arguments of defense counsel out of the presence of the jury. The procedure utilized required defense counsel to state his Motion to the Court reporter; she in turn would read the Motion and argument to the Court and the Court would rule with the jury sitting in the box.

3. That the Court failed to define to the jury an essential element of the offense charged, "moving as interstate commerce."

Motion for Judgment of Acquittal or New Trial

4. That the evidence showed that the car was stolen in Birmingham, Michigan, October 20, 1967, approximately Two Hundred (200) miles from Dayton, Ohio, and was first observed in Dayton, Ohio, October 27, 1967, Eight (8) days after the theft. There was no showing when the car was brought to Dayton and by whom so as to establish Federal Jurisdictional requirement of "moving as interstate commerce."

Wolf v. *U. S.*, 36 F. 2d 450
Davidson et al v. *U. S.*, 61 F. 2d 250
Seefeldt v. *U. S.*, 183 F. 2d 713, 715

5. The evidence showed that the car in question was stolen Eight (8) days before the defendant showed up or is alleged to have shown up, in Dayton with a Massachusetts registration of title with information corresponding with the apparent serial numbers, etc. and ostensible indicia of ownership in WILBERT PARKER. There was no contradictory evidence showing that the defendant knew or had reason to know that said car was stolen.

6. That the Court erred, as a matter of law, in failing to rule on and grant defense counsel's Motions for Judgment of Acquittal after the opening statement of the U. S. Attorney, at the close of the government's case and at the close of the defense, where the evidence could not support a jury verdict of guilty to the charge imposed.

Fong Foo v. *U. S.*, 369 U.S. 141
Cephus v. *United States*, 324 F. 2d 893
Hemphill v. *U. S.*, 312 U.S. 657

7. That the Court erred, as a matter of law, when he denied defense counsel's Motion for production of all evidence favorable to the defendant, at the close of the

government's case or make in camera inspection where clearly it was shown that statements of certain witnesses, not called by the government, were favorable to the defendant and a handwriting analysis was favorable to the defendant.

Brady v. *Maryland,* 373 U.S. 83

WHEREFORE, defendant Prays for relief.

/s/ WILFRED C. RICE
Attorney for Defendant
2436 Guardian Building
Detroit, Michigan 48226
965-7962

ORDER OF THE COURT ON THE MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

(Filed October 1, 1968)

Quoting from Pages 6 and 7 of the Order.

"It is therefore the conclusion of this Court that from the evidence presented during the trial of this case it becomes a jury question as to whether or not the defendant was guilty or not guilty as charged.

Motion for judgment of acquittal and the motion for new trial is DENIED.

Counsel shall make arrangements to have the defendant Felix Walls, before this Court for sentencing on the 24th day of October, 1968 at 11:00 A.M.

/s/ CARL A. WEINMAN
Chief Judge U. S. District Court

JUDGMENT AND COMMITMENT

(Entered October 24, 1968)

On this 24th day of October, 1968, came the attorney for the government and the defendant appeared in person and by counsel.

It is adjudged that the defendant upon his plea of Not Guilty and a verdict of Guilty has been convicted of the offense of Concealing stolen motor vehicle, Section 2313 Title 18 United States Code as charged in one (1) count and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ CARL A. WEINMAN
United States District Judge

/s/ R. SNELL
John D. Lyter, Clerk
By: R. L. Snell, deputy clerk

NOTICE OF APPEAL

(Entered October 24, 1968)

Notice is hereby given that FELIX WALLS, defendant above named, hereby Appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this proceeding on the 24th day of October, 1968.

DATED: October 24, 1968.

/s/ WILFRED C. RICE
Attorney for Defendant
2436 Guardian Building
Detroit, Michigan 48226
965-7962

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 19,138

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING OF APPEAL

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

FELIX WALLS, being first duly sworn, on oath, deposes and says:

1. That he is the Defendant-Appellant in the above entitled cause and has personal knowledge of the matters and things hereinafter stated.

Affidavit in Support of Petition for Rehearing of Appeal

2. That he has read the attached Petition for Rehearing of his Appeal and knows all matters stated therein to be true.

3. That he was denied his right to local counsel in the lower Court, pursuant to then existing Court rules, by artifice and scheme, as a result of personal feelings against counsel of his choice; that he was not thereafter offered appointed counsel to replace retained counsel; that he had retained the services of Mr. Keith A. Saeks, Esq. of Dayton, Ohio as local counsel to assist in the defense of his case and paid one half of the quoted fee, the balance to be paid at Trial; that within a week of trial, Roger Makley, U. S. Attorney, informed foreign counsel that the Court waived the requirement to have local counsel in Deponent's case; this waiver was discussed with local counsel and for the first time Deponent learned that possible ill feelings existed against local counsel and he declined to appear at the Trial, leaving Deponent without local counsel as required in all cases heard by the lower Court.

4. That during the second day of Trial, Mr. C. Roosevelt Johnson met Deponent in the hallway and expressed the fact that he had no idea who Deponent was; the FBI Agent and the Government Attorney took him into an office behind closed doors, refused to permit Defense Counsel to enter; ten minutes thereafter, said witness identified Deponent in Court as one of two parties who came to his office October 27, 1967; Deponent verily believes that said witness was forced to change his prior statements by threats and intimidation.

Further Deponent saith not.

/s/ FELIX WALLS
Deponent

Subscribed and sworn to before me this 29th day of July, 1969.

/s/ DORETHA P. HENDRICKS
Notary Public
My Commission Expires: 3-10-73

In The
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HEARING

Before the Honorable Carl A. Weinman, Chief Judge of the United States District Court, Southern District of Ohio, Western Division, Dayton, Ohio, on the tenth day of September, 1968 at 10:20 A.M. o'clock.

APPEARANCES:

MR. WILFRED C. RICE
Attorney for Defendant

MR. ROGER MAKLEY
U. S. District Attorney
for the Plaintiff

[2] THE COURT: Here I was prepared to listen to a complete restatement of this case. Looks like you are going to disappoint me. You may proceed with your motion.

MR. RICE: Thank you, Your Honor. I feel, of course, the Court knows the facts, kept notes, knows the facts better than I do I am sure.

Now, our motion is predicated upon seven reasons that we have set forth before the Court and the charge here, if the Court please, was as follows:

> "The Grand Jury charged on or about the 27th day of October, 1968 Felix Walls, in the Western Division of the Southern District of Ohio, did receive and conceal a stolen motor vehicle, that is a 1967 Cadillac DeVille, Serial No. B (as in Baker) 7217146, which was moving as interstate commerce from Birmingham, Michigan to Dayton, Ohio, and he then knew the motor to have been stolen in violation of Section 2313 Title 18 of the United States Code."

Now, we feel that on the basis of this indictment and on the basis of the facts that were presented to the Court and the jury upon the trial of this cause in April of this year that the verdict of the jury of guilty as charged was clearly erroneous and in no way sustained by the evidence presented and we suggest this to be so as a matter of law.

Now, we have set forth a group of cases to support our contention and if the Court recalls the facts were in summary that the defend- [3] ant, Felix Walls, was alleged to have brought and delivered a 1967 Cadillac, proven to be stolen in Birmingham, Michigan, and delivered that car to Alton Sheffield here in the Western Division of the Southern District of Ohio; and, that the car was left here in arrangement similar to availment or consignment to Mr. Sheffield to take care of the necessary arrangement in registering the car here in Ohio, and payment was to be made at a subsequent time; and, that after this transaction took place that Mr. Walls left Dayton and went back to Michigan.

Now, on the basis of these facts it is beyond my understanding how the jury could come in with the verdict of guilty as charged of receiving and concealing that car

in this District. Now, I would be more hesitant in objecting to his verdict if it had been under Section 2312 of Title 18, which is the statute or the statute making it a crime to move a stolen car in interstate commerce, because we must concede that if Walls brought the car to Ohio that he couldn't bring it and receive it also, because it would be a mockery to the definition of receiving to say that he received it here if he brought it here; and, there was no evidence whatsoever to sustain a finding that he concealed it here. I am sure that the Court either has or will examine the cases that we have submitted under Item No. 1.

The second item that we submitted to the Court that we objected [4] to the procedure used by the Court in requiring that we state to the Court reporter our objection to certain questions or certain other arguments that we had during the course of the trial.

THE COURT: You can skip that. We do that here all the time.

MR. RICE: Yes, sir. The reason that I objected to that was that I don't want the Court to take the position that I am suggesting that you change your policy or anything of that nature, but I am a little leery of a jury seeing and hearing what is going on in legal argument, that is why I never confronted the requirement of having to do this this way. I don't criticize it, but I simply say that it suppresses the right to a fair trial when it is done this way. In that connection also I would like to say to the Court that we were, well, we take exception to the fact that the Court sustained an objection by the prosecution when we on cross-examination questioned the agent about the alleged secret number that was taken from this automobile and the reason that we take exception to that, well, we feel that it suppresses the

right to examine all the evidence that the Government has against the defendant. It boils down to simply we have to take their word that there was such a secret number that was different from the other three numbers that was presented. We couldn't examine this number to determine if this was the truth.

[5] A third objection we submit is that the Court failed to define to the jury an essential element to the charge moving as "interstate commerce." In the case of the United States, it is found in 237 F. 2. page 604. I am sure Mr. Makley is aware of that case and knows the case very well because we discussed that case in his office. That case ruled that any essential element such as moving interstate commerce the Court must charge and clarify in the minds of the jury the significance of this language. And I am sure that the record is bare of any such charge on the part of the Court to the jury.

The assignment of error that we submit is that we feel that under the findings and the rulings of the Court in the case of Wolf v. U. S., 36 F. 2d 450; Davidson v. U. S., 61 F. 2d 250; Seefeldt v. U. S., 183 F. 2d 713 and 715, that the evidence in this case is insufficient to establish both a knowledge on the part of the defendant, that the car was a stolen motor vehicle and that it was moving as interstate commerce, and, we suggest that because of the fact that the car was alleged to have been stolen on March 10th, approximately two hundred miles from Dayton, and I am sure that the Court very well knows this is a distance that can be driven in a period of some three hours down highway 75, and the car was first observed to be in Dayton, Ohio, on October 27, 1967, which was eight days after the alleged theft; and, in that connection there was no showing on the [6] part of the Government that where the car

was during this period of eight days. It could have been stopped moving as interstate commerce. Suppose we assume the car had been brought down here on the twentieth, then it would have been ceased to move as interstate commerce by the twenty-seventh.

The fifth assignment of error is in similar nature to the fourth assignment of error and I won't submit any further argument on that.

The sixth assignment of error is that we allege the Court erred as a matter of law because he failed to rule on a judgment of acquittal after the opening statement of the United States Attorney and at the close of the Governments case and at the close of the defense where the evidence could not support a jury verdict of guilty to the charge imposed. And in that respect the portions that concerns the making of the motion for a judgment of acquittal after the opening argument of the Government's attorney we submit the case on Fong Foo v. U. S., 369 U.S. 141.

THE COURT: The Court has read all of those cases.

MR. RICE: Yes. We feel that there was error in the Court failing to consider those motions and actually granting those motions.

THE COURT: Your presentation is what you already have in your brief.

MR. RICE: Yes.

[7] THE COURT: Do you have anything else?

MR. RICE: No, sir.

THE COURT: There are other cases since this time because I have four or five of them.

MR. RICE: If the Court, please, I wish you would be kind enough to give me those citations.

THE COURT: Let's hear the argument on the other side first.

MR. MAKLEY: I will be very brief. As Your Honor may recall during trial we had an argument for hearing outside the presence of the jury substantially the same matters that were raised today by counsel. I have nothing to add today beyond what I stated to the Court in argument at that time. I would say simply that as far as the United States is concerned the evidence in fact does support the charge. We can argue definitions of moving as interstate commerce all day long. The suggestion was made why wasn't this charge brought under Section 2312, Title 18 of the United States Code, which, as Your Honor knows, is popularly known as the Dyer Act; actually 2313 is part of that same act. I can say in my opinion the reason I did not present to the grand jury a proposed indictment under Section 2312 of the United States Code is that there was no evidence, I felt, to support a contention that Felix Walls had himself transported this automobile in interstate commerce knowing it to have been stolen. I had no [8] such evidence nor do I think the transactions of the proceedings of the trial brought out such evidence. What it did establish was that Felix Walls was present at or about the time indicated in the indictment in the Southern District of Ohio, in possession of the car set forth in the indictment knowing it to have been stolen and therefore under the circumstances the proof at trial indicated a violation of receiving and concealing under Section 2313 of Title 18. In that connection we or I define receiving basically as possession. Concealing, again, can be defined in terms of whatever steps were taken to conceal the fact that in the Southern District of Ohio, that is, to conceal the fact that this was in fact a stolen automobile such as other license plates, the certificate of Title and the other matters that came out during the

course of the trial that were used by Felix Walls to conceal the true identity of the car, the owner of the car, the serial number of the car — this is concealment.

I think the cases will indicate that concealment does not confine itself in these situations to taking a car and putting a canvass over it or hiding it in the garage, there are other methods and manners of concealing an automobile that is stolen.

THE COURT: Do I understand you to say that the premise of this must be a car moving interstate commerce is not within the purview of your indictment.

MR. MAKLEY: I do not understand your question.

[9] THE COURT: You made a statement that you couldn't prove that this automobile was moving in interstate commerce and yet that is one of the essential elements.

MR. MAKLEY: No, I didn't mean to say that. What I meant to say was that I could not prove that Felix Walls himself transported this automobile from Detroit, Michigan, or any place else to Dayton, Ohio, or anywhere in the Southern District of Ohio, but he himself drove it.

THE COURT: Then the question is whether eight days is sufficient to bring it within this theory of moving interstate commerce.

MR. MAKLEY: That is correct. And it is the position of the United States that the period of time —

THE COURT: Do you have any case on that? I have cases where it is twenty-four hours and where it is two or three days.

MR. MAKLEY: Your Honor, I have no cases immediately available. I haven't researched the point to be quiet honest with the Court.

THE COURT: I am interested in what is the period of time when a car disappears in one State and appears

in another that you can say it is moving as interstate commerce.

[10] MR. MAKLEY: Your Honor, I can only refer to the situation under Section 2312 which prohibits the interstate transportation of a stolen motor vehicle knowing it to be stolen. In those situations it doesn't make any difference what period of time has elapsed from the unlawful stealing of the automobile to the discovery of the crime.

THE COURT: That is when you prove who took it.

MR. MAKLEY: In my opinion eight days is a reasonable period of time to set forth in the indictment to say it is still moving as part of interstate commerce.

THE COURT: The case I had referred to where it deals with the question of twenty-four hours in a State is found in 388 Federal Reporter 2d, 286, decided by the Eighth Circuit in January of this year.

Now, it goes on to talk about possession giving rise to permissible inference of interstate transportation of guilt knowledge. You are not relying upon that?

MR. MAKLEY: Your Honor, I can't, in that the charge was brought under Section 2313. I would be the first one to say that the proof of trial certainly does not show that Felix Walls himself got in this automobile and drove it to the Southern District of Ohio. And if I had to do a little guess work based on the way Felix Walls operated I probably say [11] he didn't, probably someone else drove the car and he came by airplane or someone else and I would say that I could never prove that Felix Walls drove this car here. I can prove that he had unlawful possession of that automobile in the Southern District of Ohio, knowing it to have been stolen at the period of time of approximately eight days after the car was in fact stolen in Michigan. And, if the question is how long a

period of time do we say is permissible is it eight days, twenty days, twenty-four hours, or one hundred days. I don't know, Your Honor. I don't know. I would think eight days certainly a limited period of time and a reasonable period of time to set forth in the indictment.

THE COURT: Are there any cases under this receive and conceal? I haven't found any. I wonder if there were.

MR. MAKLEY: I found one which I believe I stated to the Court during our argument outside of the presence of the jury at trial, defining to some extent the different crimes set forth in Section 2313. receiving, concealing, disposing, selling of, as I recall it points out these are all separate and distinct crimes, it is in the disjunctive and evidence that would support any one of the stated crimes set forth would be sufficient to support a jury verdict of guilty. I think you have to look at the statute as [12] a whole, Your Honor, and what it was intended to get at. As the Court knows it is very difficult in most cases to prove that an individual himself transported a car interstate commerce, knowing it to have been stolen, unless he confesses to it or unless he is actually apprehended in the car. Even then —

THE COURT: What was the evidence here with reference to him being in possession of the car? He denied it.

MR. MAKLEY: The evidence as I recall was the fact that after the arrangements were concluded for the purchase of the automobile by telephone, and I think perhaps one visit by Mr. Walls wherein he was unable to make contact with — I can't remember the name of the individual who purchased the car from him here — but when he came back at or about the date indicated in the indictment he called the individual in Dayton and said that he now had the car and was ready to turn it over to him.

THE COURT: He drove in the driveway as I remember with the car according to the testimony.

MR. MAKLEY: No, Your Honor, I believe – I may stand corrected – I believe the testimony was to the effect that the individual here went down to the Stratford House and met him wherein he had the car at that time and then Mr. Walls followed this individual out to his house and then, of course, the subsequent trouble developed in attempting to [13] transfer the Title to the differences in the Title laws between Michigan and Ohio and the evidence was to the effect that Mr. Walls and the individual who purchased the car went out to, I believe his name was Mr. Johnson, the Notary Public, to have a Bill of Sale notarized and at that time Mr. Walls was representing himself as the owner of the car as reflected on the Certificate of Title, which the purchaser here in fact did have, So we have him in possession of the car and likewise in possession of the Certificate of Title and the Bill of Sale as the alleged owner of the car in the Southern District of Ohio. Your Honor, I have nothing further to add beyond what I have said before. As far as the location of the secret number is concerned this is a matter of public policy. We did introduce lifts of the secret number by the Special Agent of the Bureau, Federal Bureau of Investigation as physical evidence in this case. And I believe at the time there was some question about the application of the Brady decision in the Supreme Court in this case. Mr. Rice didn't bring that up today, but I think I covered that at the time we had the hearing before the Court.

At this time I have nothing further to add unless the Court has a question of me.

THE COURT: This possession of property recently stolen in another State is discussed in a recent United States Court of Appeals de- [14] cision for the Sixth Circuit,

decided May 27, 1968. United States of America v. Charles Morgan and Daniel DeFew. This is with reference to moving interstate commerce; it is not exactly the same. Talks about the Court's charge therewith.

Gentlemen, it has been a long time and I have to review this entire matter.

(Discussion had off the record.)

(WHEREUPON, Court adjourned 11:00 o'clock A.M.)

[Certificate]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

(Filed July 16, 1969)

Before PHILLIPS, EDWARDS and PECK, Circuit Judges.

This is an appeal from conviction on a one count indictment charging appellant with knowingly receiving and concealing a stolen motor vehicle which was moving as interstate commerce, in violation of 18 U.S.C. § 2313.

Upon consideration of briefs, oral arguments and the entire record the Court finds that the verdict of the jury is supported by substantial evidence, that the District Court did not err in its charge to the jury, and that the appeal is without merit.

It is ORDERED that the judgment of the District Court be and hereby is affirmed.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

PETITION FOR REHEARING

(Including Request for Written Answer by the Court and Appellant's Affidavit in Support of Petition for Rehearing)

WILFRED C. RICE
2436 Guardian Building
Detroit, Michigan 48226
Attorney for Defendant-Appellant

ORDER DENYING PETITION FOR REHEARING

(Filed September 17, 1969)

Before PHILLIPS, EDWARDS and PECK, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

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372-193—70

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 869

FELIX WALLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 30a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1969 (Pet. App. 30a). A petition for rehearing was denied on September 17, 1969 (Pet. App. 31a). On October 9, 1969, Mr. Justice Stewart ordered the time for filing a petition for a writ of certiorari extended to and including November 17, 1969. The petition for a writ of certiorari was filed on November 20, 1969, and is thus out of time under Rule 22–2 of the Rules of this Court.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for receiving and concealing a stolen automobile moving in interstate commerce with knowledge that it had been stolen.

2. Whether the trial court's failure to define the phrase "moving as interstate commerce" in its charge constituted plain error.

3. Whether the court heard and ruled on defense motions out of the hearing of the jury.

4. Whether the government concealed evidence favorable to the defense.

5. Whether petitioner was denied local co-counsel at his trial.

6. Whether defendant was entitled to learn the confidential location on an automobile of its true serial number.

7. Whether a government agent's examination of an automobile to determine its true serial number constituted an unlawful search.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on a one-count indictment charging that he received and concealed a stolen motor vehicle moving in interstate commerce, knowing it to have been stolen, in violation of 18 U.S.C. 2313 (R. 1, 3). On October 24, 1968 he was sentenced to imprisonment for four years (R. 11). On appeal to the United States Court of Appeals for the Sixth Circuit, the conviction was affirmed by order.

1. The government's evidence showed that on March 3, 1967, William Bennett leased from Planned Auto Management at Birmingham, Michigan, a 1967 four-door Cadillac sedan, serial number B7 217146 (Tr. 6–9).[1] At 12:45 a.m. on October 20, 1967, Bennett parked and locked this Cadillac on a lighted parking lot at his apartment in Bloomfield Hills, Michigan (Tr. 14–16, 18–19). Later that morning Bennett discovered that the car was missing and reported it stolen (R. 16–17).

Five days earlier, Alton Sheffield of Dayton, Ohio, who was interested in purchasing a Cadillac at a reduced price, had had a long-distance telephone conversation with petitioner, who was then in Detroit, concerning the purchase of a Cadillac. Petitioner said the price would be $3900 (Tr. 22–23, 25–26, 30, 34–35, 68). Petitioner said he did not then have a car in stock, but he would see what he could come up with in about one week (Tr. 68). That same day, petitioner met Weaver, Sheffield's cousin, in Dayton and said he wanted to see Sheffield about an automobile (Tr. 43–44). At Weaver's house petitioner displayed some Massachusetts registration papers which he said Sheffield was to sign (Tr. 47, 49, 57). Petitioner also quoted a price on a Cadillac for Weaver (Tr. 47). Weaver and petitioner tried to find Sheffield at his place of employment, but were unable to do so at that time (Tr. 45–46).

On October 27, 1967 (eight days after Bennett's 1967 Cadillac had been stolen in Michigan), petitioner

[1] "Tr." refers to the transcript of the trial testimony, which is designated as "R. 9a" in the record on file before this Court.

appeared in Dayton with a 1967 Cadillac for Sheffield. Sheffield saw petitioner driving this Cadillac to Sheffield's home (Tr. 60–61). Petitioner and Sheffield then went to the Title Bureau to register the car. When Sheffield alone entered the office, he was informed that he would have to have a bill of sale and an Ohio inspection certificate. Petitioner and Sheffield obtained the required inspection certificate (Tr. 61–62). Petitioner told Sheffield that upon calling the Title Bureau he had been informed that any bill of sale would be permissible as long as there were no liens against the car (Tr. 63).

Petitioner and Sheffield purchased a bill of sale at a book store. They took it to a notary who filled it out upon the basis of information petitioner furnished (Tr. 64, 72–73). The bill of sale indicated that there were no liens and that the purchase price was $5,000; petitioner signed it with the name "Wilbur Parker" as seller. He did so after showing the notary a Michigan driver's license in that name (Tr. 72–73, 108–110). Sheffield testified that he did not know the car was stolen; and that he had no particular reaction when petitioner signed as Wilbur Parker since at that time he knew petitioner only by the name "Phil" (Tr. 73). Petitioner then gave Sheffield the following papers pertaining to the Cadillac: Gov. Ex. 5, a card showing Sheffield as the owner and giving his address as 85 Kingsdale Street, Dorchester, Massachusetts[2]; Gov. Ex. 6, a sales tax payment, on which the names

[2] These entries, too, were fictitious (Tr. 69–72, 99–102, 105, 148–149, 152–153).

Sheffield and Wilbur Parker appeared[3]; Gov. Ex. 7, the Ohio inspection certificate; and Gov. Ex. 8, the bill of sale executed before the notary. After turning the automobile over to Sheffield, petitioner told him to call him when he (Sheffield) had obtained a loan on the car and thus could pay petitioner for it (Tr. 64–65).

Sheffield went to the Title Bureau in Dayton on Tuesday, October 31, 1967, and was told that his bill of sale was invalid. He explained that the seller had informed him that any bill of sale would be good if there were no liens against the car (Tr. 65–66). Shortly after this, FBI agent Feraco appeared and took Sheffield to the police station for questioning about the Cadillac (Tr. 66). With Sheffield's consent, Feraco inspected the Cadillac and found that the serial number stamped on the bell housing of the vehicle had been altered (Tr. 66–67, 126). Feraco then took the car to the Dayton Police Garage (Tr. 126). Sheffield turned over to Feraco the papers pertaining to the car (Gov. Ex. 5 through 8) (Tr. 128–131).

On November 2, 1967, agent Feraco examined the Cadillac to determine if the serial numbers listed on the registration papers and the serial numbers which are referred to as public serial numbers matched the true serial number of the car. The examination showed that they did not match, and that the true serial number (B7217146) was the same as that on the Cadillac which had been stolen on October 20

[3] Petitioner's latent fingerprint was found on this document (Tr. 157–160).

(Tr. 127–128). No search warrant had been obtained for examination of the serial number on the car (Tr. 143–144). In cross-examination of agent Feraco, the court sustained an objection to a question as to the exact location on the Cadillac of its true serial number, on the ground that "[t]hose are secret numbers on automobiles" (Tr. 142–143, 128).

On November 4, the stolen Cadillac was returned to Planned Auto Management at Birmingham, Michigan and picked up by the lessee, Bennett (Tr. 10–11, 17). The car was brown with a black top, the same color as when it was stolen (Tr. 17–18).

2. Petitioner testified on his own behalf that he did not deliver or sell the stolen Cadillac to Sheffield, as Sheffield had testified (Tr. 196, 215). Petitioner also denied ever having seen the notary prior to trial and denied signing the bill of sale (Gov. Ex. 8) in the name of Wilbur Parker (Tr. 215–216).

3. In its charge to the jury, the court instructed that the burden of proof was upon the prosecution to establish the guilt of petitioner beyond a reasonable doubt (Tr. 227–230). A subsequent part of the charge was as follows (Tr. 232–234):

> Now, the Government must prove some essential elements of this crime *beyond a reasonable doubt*. And I would like to call your attention to these essential elements.
>
> (1) That the defendant, Felix Walls, did receive and conceal a motor vehicle, a Cadillac automobile;

(2) That the defendant did so with unlawful and fraudulent intent;
(3) That said Cadillac was moving as interstate commerce from Birmingham, Michigan to Dayton, Ohio;
(4) That Felix Walls did commit said act knowing that the motor vehicle, the Cadillac, was stolen; and
(5) That the offense charged was committed on or about October 27, 1967 in the Western Division of the Southern District of Ohio.

The Government must prove each of these essential elements. And if the Government fails to prove anyone of those five elements your verdict must be for the Defendant. * * * In a criminal prosecution for receiving and concealing a motor vehicle, knowing it to have been stolen is an essential element of the crime and it must be shown by a *preponderance of the evidence* in order to establish the guilt of the accused. * * * Now, that briefly, ladies and gentlemen, is your duty to determine whether Felix Walls did receive and conceal a Cadillac moving in interstate commerce knowing the said Cadillac was stolen. If you find as I have outlined to you that the Defendant is guilty of all these essential elements, have proven *beyond a reasonable doubt* then you shall find him guilty. If, however, you find that the Government has failed to establish *beyond a reasonable doubt* the truth of anyone or more of the essential elements of this crime you will return a verdict of not guilty. [Emphasis added.]

ARGUMENT

As noted, the petition is out of time. In any event, petitioner raises no issue requiring plenary review by this Court.

1. Contrary to petitioner's contention (see Pet. 6–9, 15–19), the evidence we have detailed was sufficient to support his conviction for receiving and concealing the stolen Cadillac moving in interstate commerce with knowledge that it had been stolen. See *Seefeldt* v. *United States*, 183 F. 2d 713, 715–716 (C.A. 10); *United States* v. *Meek*, 388 F. 2d 936, 938 (C.A. 7), certiorari denied, 391 U.S. 951; *Spradlin* v. *United States*, 394 F. 2d 816, 817 (C.A. 9). The argument that petitioner's possession in Ohio some eight days after the theft in Michigan was too remote to establish the interstate movement of the vehicle wholly overlooks the fact that the actual sale to Sheffield came after negotiations by petitioner which preceded the theft. Petitioner's receipt of the car which had moved in interstate commerce could be reasonably inferred from his prior arrangement to sell the car and from the fact that Sheffield saw him driving it in Dayton only eight days after it had been stolen in Michigan. The jury could also reasonably find that petitioner had concealed the car and knew it was stolen, from the devious manner in which he tried to effect a false Ohio registration by giving Sheffield fictitious Massachusetts registration papers, inquiring about the requirements for a bill of sale, and placing a false signature on the bill of sale. This was a factual issue for the jury to decide. See *Schwachter* v. *United States*, 237 F. 2d 640, 644 (C.A. 6).

2. There was no plain error as petitioner contends (Pet. 10–15), by reason of the trial court's failure *sua sponte* to define the phrase "moving as interstate commerce." The court instructed that one of the essential elements of the crime which was required for a finding of guilty was that "said Cadillac was moving as interstate commerce from Birmingham, Michigan to Dayton, Ohio" (Tr. 232). Petitioner presumably was satisfied with this charge; it was composed of simple, unambiguous, and clearly understood language. Since he did not object to this instruction nor ask for an additional instruction on this issue, it was too late for him to raise this point on appeal. F. R. Crim. P., Rule 30.

Cases such as *Schwachter* v. *United States*, 237 F. 2d 640 (C.A. 6) and *United States* v. *Lang*, 239 F. 2d 676 (C.A. 3), upon which petitioner relies, are inapposite. In those cases the trial court erred by assuming in its charge that the stolen car had moved in interstate commerce, and thus took away from the jury a controverted issue of material fact. Here, on the other hand, the court properly left it for the jury to decide whether the car was "moving as interstate commerce."[4]

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[4] Petitioner also contends that the court's charge was erroneous in stating that a defendant's knowledge that the car had been stolen must be shown by a "preponderance of the evidence." That this was merely an inadvertent slip of the tongue is shown by the fact that petitioner's experienced counsel made no objection, and by numerous other excerpts from the charge properly requiring that all elements of the crime be proved "beyond a reasonable doubt" (Tr. 227–230, 232–234; see Statement *supra*, pp. 6–7).

3. Petitioner was not denied due process of law by the procedure the trial court followed in requiring counsel to relate objections and motions to the court reporter. The reporter would read counsel's arguments to the court, after which the court would make its ruling. Petitioner contends that such procedure prejudiced him because it was conducted without excusing the jury (Pet. 19–20). Regarding this, the trial court in its order overruling petitioner's motion for acquittal or a new trial, stated (R. 10, p. 2):

> 2. Defendant's counsel cannot be serious in claiming error by the Court's refusal to hear motions and arguments of defense counsel. This was not a complicated case for trial and all motions made by defense counsel and rulings made by the Court were made directly to the Court Reporter and were not within the hearing of the members of the jury.

(See, *e.g.*, Tr. 40, 122–123, where motions by defense counsel were made "[o]ut of hearing of the jury.")

4. Petitioner contends that the government failed to comply with *Brady* v. *Maryland*, 373 U.S. 83, by concealing evidence favorable to the defense (Pet. 20–21). The record refutes this contention. Petitioner asked for the submission into evidence of the report of an FBI handwriting expert, who stated that due to lack of adequate handwriting samples, he could not determine whether petitioner prepared Gov. Exs. 5, 6, 7 and 8. The government attorney pointed out that the reason for this was that petitioner himself had refused to submit handwriting samples for comparison (Tr. 175–176). This report was not evidence favor-

able to the defense; it was merely a showing that the handwriting expert had insufficient documentary material upon the basis of which to render an intelligent opinion.

Petitioner also claimed that the government was concealing a report of an FBI interview with Mrs. White, which showed that she witnessed the signing of the bill of sale (Gov. Ex. 8) before the notary and said that although a photograph of petitioner looked familiar, she was unable to say if she had seen him in the notary's office or at some other place. The government attorney pointed out that he was unable to serve a subpoena on Mrs. White, and that he was not concealing evidence favorable to the defense (Tr. 177–178). The copies of the subpoenas contained the addresses of Mrs. White and some other witnesses who did not testify (R. 2). Petitioner could have subpoenaed any of these persons as defense witnesses if his investigation had shown that their testimony would have been favorable to the defense.

5. Petitioner claims he was denied effective assistance of counsel since he did not have local co-counsel at his trial (Pet. 22–25). The local rule in effect at the time of the trial on April 17, 1968, to which petitioner apparently refers, is Rule 4 of the Rules of the United States District Court for the Southern District of Ohio, effective March 1, 1950.[5] A reading of

[5] Rule 4: "*Designation of Local Counsel:* Whenever a party to a cause is represented only by counsel not residing within the district, such counsel shall designate by writing filed in the cause, some member of the Bar of this court residing in the district upon whom notices and papers may be served."

this Rule does not make it absolutely mandatory that an accused have local co-counsel at the trial; it merely provides that an accused's out-of-district counsel shall designate local counsel upon whom notices and papers may be served.

Petitioner concedes that the trial record does not show that he was denied local counsel (Pet. 23). There is nothing in the record to indicate that after his designated local counsel, Mr. Saeks, withdrew, petitioner could not have obtained other local counsel. There was nothing in Rule 4 to prevent the court from hearing the case without the presence of a local co-counsel for petitioner. Since petitioner was represented by experienced Michigan counsel of his own choice, who competently and vigorously defended his case, he was not denied the effective assistance of counsel.

6. Petitioner contends that in the cross-examination of FBI agent Feraco the court erred in sustaining an objection to a question as to the exact location on the stolen Cadillac of its true serial number (Pet. 25–27). The court's ruling, however, was proper on the ground that "[t]hose are secret numbers on automobiles" (Tr. 143). Petitioner has cited no pertinent authority for the proposition that the confidential nature of the location of the true serial numbers on automobiles should no longer be protected.[6] Public policy is served by keeping such locations confidential and thus unavailable to potential automobile

[6] *Roviaro* v. *United States*, 353 U.S. 53, in which the disclosure of an informer's identity was required because he had participated with the accused in the crime involved so that his testimony might have been helpful to the defense, is in no way analogous to the situation in the instant case.

thieves. Apart from this, even if petitioner had been told the exact location of the true serial number, the record does not show how this would have been helpful. Since he did not claim that the number on the impression lifted from the car was erroneous, mere knowledge as to where the number came from would not have aided his defense.

7. We do not see how petitioner had any possessory interest in the automobile which would afford him a basis to assert that there was an illegal search. Since Sheffield had a possessory right in the car he could properly consent, as he did (Tr. 67, 126), to turn it over the F.B.I. agent Feraco for examination without a search warrant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 869

FELIX WALLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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JURISDICTION

Counsel for the government argues that our Petition for a Writ of Certiorari was filed November 20, 1969, and is out of time under Rule 22-2 of the Rules of this Court. This statement is incorrect. Our Petition was served on the Clerk's Office November 14, 1969, but was not docketed until November 20, 1969, because the 6th Circuit Court of Appeals had not transmitted the file to the Clerk of this Court; although, requested to do so October 27, 1969. We do not believe that this Court should penalize Petitioner for a tardy transferral of the Lower Court's file by the Court of Appeals.

COUNTER STATEMENT OF FACTS

The record does not indicate that Petitioner *appeared* in Dayton with a 1967 Cadillac for Sheffield, as stated in the opposing Brief. The record stated as follows:

> T. 61 – "A. When I got to the Stratford House I looked for a '67 Cadillac and I saw it parked in a driveway to a parking lot and I assumed it was him and blew my horn and he backed out and followed me to my house."

REPLY ARGUMENT

Appellee says we have presented no issues meritorious of plenary review by this Court. Thank GOD, just saying this doesn't make it so. Appellee's arguments are simply whitewashing attempts, in hope that this Court will arbitrarily make our Petition one of the many casualties. However, we appeal to the conscience of this Court to carefully examine all arguments, pro and con.

1. In Paragraph One (1) of his argument, Counsel for Appellee cites three cases to support his claim that the conviction of Petitioner was supported by the evidence in this case. All three cases are clearly distinguishable and inapplicable in this case:

(a) *Seefeldt* v. *United States,* 183 F. 2d 713 – In this case, Defendant was charged under 18 U.S.C. Sec. 2313, as was Defendant in the instant case. Defendant made contact with one Downing in New Mexico from Colorado to obtain titles for Ten (10) cars by devious means. Downing was employed with the Secretary of State in New Mexico. When Downing told agents about this plot, Defendant hid the car for several days. When questioned by agents, Defendant told them conflicting stories about the car. Defendant testified in Court that he *received* the stolen car from one Wilson. Wilson testified to *deliver-*

ing the car to Defendant. The evidence showed that persons unknown to Defendant and Wilson had brought the car to Wilson and removed Texas license plates from it. Defendant was to sell the car. The Court said, at Page 716, "When Defendant knew he was under surveillance, he cancealed the car and would not let agents know where it was." The Court affirmed the conviction.

(b) *United States* v. *Meek,* 388 Fed. 2d 936 — In this case, Defendant leased car in the name of Meek at Tampa, Florida for Two (2) days and did not return it at the expiration of the lease or secure an extension of time. Defendant took the car to Illinois and Missouri, with one Hanson, the government's star witness. After one week, the sheriff at Tampa, Florida reported the car stolen. Defendant changed the license plates on the car and later told Hanson not to tell anybody about the car, so nobody would get in trouble. Defendant promised Hanson he would pick the car up and get rid of it. Hanson was stopped by officers for a traffic violation and they recognized the car as being one reported stolen. Defendant was charged in a two count indictment under 18 U.S.C. Secs. 2312 and 2313. The Court affirmed the conviction.

(c) *Spradlin* v. *United States,* 394 F. 2d 816 — In this case, the evidence showed that Defendant was in Flagstaff, Arizona when the car in question was stolen from the dealer's lot. Within Two (2) weeks after the theft, Defendant was arrested while operating the car in Nevada. Defendant was charged under 18 U.S.C., Sec. 2312. The Court said the facts supported the jury finding and affirmed the conviction.

We concede that all of the aforestated decisions are correct. However, they are inapplicable as precedent for a decision in this case for the following reasons:

(1) In the *Seefeldt* case, supra, Defendant and Wilson testified in Court that Defendant received the car in New

Mexico and tried to obtain titles for cars by devious means. Also, the evidence clearly showed that when agents questioned Defendant about the car, he concealed its whereabouts from them for several days.

In the instant case, there was no evidence that Walls received and/or concealed the car in question at Dayton, Ohio. Counsel for the government concedes that he could not prove interstate transportation against Walls. (See App. 25a, 26a, 27a) He further concedes that his proofs at trial shows only *possession* by Walls in the Southern District of Ohio. (See T. 174 and 175; App. 27a) Further, government Counsel, in his argument against Defendant's Motion for Judgment of Acquittal, concedes, by abandonment, that he did not prove *concealing* of the car by the Defendant, and argued that he did not have to prove both charges in the indictment, although they were alleged in the conjunctive; citing *Weaver* v. *U.S.*, 374 F. 2d 878 to support his argument. (See T. 173-175) If Counsel for the government agrees that he did not prove *concealing*, then how can the jury find the Defendant guilty as charged? The Court, at least, should have granted the Motion for Judgment of Acquittal on the issue of concealing and sent the case to the jury on the question of receiving.

In this case, government Counsel says he proved unlawful possession by Defendant. He relies on the uncorroborated statement of Sheffield that Walls followed Sheffield from the Stratford House to Sheffield's House. Sheffield did not place Walls behind the wheel as driver of the car. Not one witness put Walls in control of the car in question. Counsel equates possession with *receiving*. This certainly is not enough to convict under 18 U.S.C., Sec. 2313. We join the trial judge when he asked government Counsel: "What was the evidence here with reference to him being in possession of the car? He denied it." (App. 28a)

(2) The *Meek* case, supra, is clearly distinguishable from the instant case. In this case, the District Attorney concedes that he could not prove interstate transportation by Walls and, therefore, did not bring charges under 18 U.S.C., Sec. 2312. However, in *Meek*, the testimony of an accomplice put Meek behind the wheel as operator in several states and changing the license plates to conceal the identity of the car; therefore, he was charged under 18 U.S.C., Sec. 2312 and 2313. Counsel, by abandonment, also, concedes no evidence of concealment against Walls, in this case. (See T. 173-175). Further, in this case, the car in question bore Massachusetts plates, the Massachusetts Registration, which is synonomous to a title in most other states, and other papers, contained the name of Alton Sheffield. Sheffield told Ohio authorities that he (Sheffield) drove the car from Massachusetts to Dayton, Ohio. (T. 78)

(3) The *Spradlin* case, supra, was a charge under 18 U.S.C., Sec. 2312. Defendant was caught operating the stolen car in Nevada, within two weeks after it was stolen in Arizona where he was at the time of theft. In the instant case, Walls was charged under 18 U.S.C., Sec. 2313, which in addition to proof of interstate transporting, there must be proof of "Receiving and Concealing." Therefore, *Spradlin* is inapplicable as a precedent.

Counsel for Appellee says, "Petitioner's receipt of the car which had moved in interstate commerce." This conclusion is unsupported by any evidence presented in the instant case. Defense counsel participated in the trial of this cause and has examined all transcripts several times. Counsel challenges Appellee to point out the evidence upon which he relies.

2. In Paragraph Two, Appellee argues that the Court's failure to define the phrase "Moving as interstate commerce" as a guideline for the jury is not plain error. We

do not believe that a jury of lay people can make a factual finding on such an essential element without proper guidelines from the Court.

Counsel goes on to argue that the following charge of the Court was an inadvertent slip of the tongue:

> T. 233 — "In a criminal prosecution for receiving and concealing a motor vehicle, knowing it to have been stolen is an essential element of the crime and it must be shown by a *preponderance* of the evidence in order to establish the guilt of the accused." (Emphasis added)

Federal Rules of Criminal Procedure 52 (b)

> "Plain Error — Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

Any legal scholar will agree, without looking up and citing authorities, that a statement alleging proof in criminal cases need be shown by a "preponderance of evidence" is "Plain Error." Appellee argues that this was an inadvertent error. The record does not support this conclusion. One would have to guess whether the jury understood it this way and applied the theory of "beyond a reasonable doubt."

The following are cases where alleged inadvertent errors were made in the Courts charge to the jury and in each instance, the Appellate Court invoked Rule 52 (b) and remanded the cases for new trial:

> *U.S.* v. *Lang*, 239 F. 2d 676, 677 — The Appellate Court concluded that the trial Courts language in the charge was strong enough to lead one to believe that the Court was saying the cars were stolen. The Court said, "No doubt the Court *inadvertently* used such positive language, but this is not sufficiently clear to support the instruction given. (P. 678) The error

of the trial judge in the substance of the charge was so fundamental that we must order a new trial, despite the fact there were no specific objection taken by Lang's Counsel." (Emphasis added)

Citing: *U.S.* v. *Cumberland,* 200 F. 2d 609, 611; *U.S.* v. *Pincourt,* 159 F. 2d 917, 919; Fed. Rules Crim. Procedure 52 (b) 18 U.S.C.

U.S. v. *Cumberland,* 200 F. 2d 609, 610, Judge Hastie said — "We get no clear meaning from the quoted language and we think it unlikely that the jury did. It is possible that the explicit charge on burden of proof and reasonable doubt may have prevented this confusing statement from doing harm, *but we cannot be confident of that conclusion.*" (Emphasis added)

How the jury understood a mistake in a charge by the Court, should not be a guessing game for Appellate Courts, where the mistake is substantive. The Defendant is entitled to have the jury correctly instructed on the law. The purpose of rule 52 (b) is to offset the infallability of Counsel and safeguard the rights of an accused.

3. As to Appellees argument Number 3, Counsel for Appellant will simply say that the jury was closer to the Court and reporter than defense counsel and Defendant. Since we had no difficulty in hearing the reporter reading arguments and rulings from Counsel table, we assume that the jury likewise had no difficulty so hearing.

We believe our request that arguments and rulings be heard in chambers or after excusing the jury from the Courtroom was reasonable, and the Court's refusal was an abuse of discretion.

Again, what effect this had on the jury's decision should not be a guessing game.

4. In argument Number 4, Counsel for Appellee discusses two of Seven (7) witnesses and contends that Peti-

tioner was not denied favorable evidence upon demand. Counsel argues that the FBI handwriting expert stated that he could not say whether Petitioner prepared Exhibits 5, 6, 7 and 8, because of lack of adequate samples. This is obviously incorrect, because the witness did not testify. We must assume that some samples were submitted for comparison in the first instance. This Court can take judicial notice that Petitioner signed the personal bond forms, acknowledgment of the indictment and property receipt forms. Petitioner was asked if he would do some writing. He refused when the agent declined to explain why. Statements of government Counsel, in this respect, is not evidence.

Statements of government Counsel to the effect that he could not serve a subpoenae on Mrs. White is no proof of this fact. Insignificant witnesses were brought in from Massachusetts, Michigan and Washington, D.C. Yet Counsel claims they could not bring in local witnesses whose names and addresses were known only to them.

Counsel argues that defense counsel could have subpoenaed these witnesses because subpoenaes were there with their addresses recorded. The record does not support this conclusion. Since the trial Court denied our Motion to compel the government to turn over all evidence favorable to the Defendant, we had nothing but names to work with. (see T. 180) Also, we were unfamiliar with the Dayton area. This was one of many reasons why we claim that assistance of "local cousel" was imperative to a fair trial in this case.

Counsel for Appellee does not address himself to the absence of Mrs. Sheffield, Calvin Baines, Mrs. Alma Lawson, the clerk at Everybody's Book Store, the inspection officer at Central Oldsmobile Co. and Mrs. William Gordon, who were all res gestae witnesses. These witnesses

were shown pictures of Defendant by the agent, who had reports of their statements.

The government, admittedly, had a weak case and hand-picked witnesses whose testimony was favorable to their cause. All key witnesses used by the prosecution were relatives and a friend of Alton Sheffield. At one time, Mrs. Sheffield was in the Court building, but was not called as a witness.

See: *Hamric* v. *Bailey,* 386 F. 2d 390 — Writ of Habeas Corpus affirmed where state prosecutor failed to disclose laboratory report until after trial.

Barbee v. *Warden, Maryland Penitentiary,* 331 F. 2d 842 — Habeas Corpus granted where police failed to disclose ballistic and finger print report showing different revolver was used in shooting to exculpate Defendant. Court said this was a violation of Defendant's right to a fair trial.

5. In reply to Appellee's argument Number 5, we cannot dispute Counsel's statement that the Court referred to local rule 4, concerning the question of Counsel at the Arraignment March 29, 1968. However, we unequivocally state that the trial judge said we must have local Counsel to appear in that Court, and further said, his rules required such in *all* cases. (See App. 18a) (Also, Arraignment transcript or Affidavit of Defense Counsel App. 33a) These allegations were not denied in the Court of Appeals, and should be accepted as true. Further, since the Court had to waive this requirement, as alleged in Paragraph 3 of Petitioner's Affidavit, in the Court of Appeals (App. 18a), obviously, such must have been mandatory to necessitate a waiver.

Counsel further argues that there is nothing in the record to show that Petitioner was denied the assistance of local Counsel. Counsel overlooks the undenied Affidavit

of Petitioner filed in the Court of Appeals (App. 18a), which is evidence. Since the trial judge did not say he was invoking rule 4, at the arraignment, we cannot say whether he was acting pursuant to a particular rule, however, we do know that he said *local* Counsel *must* appear in that Court. (Emphasis added) (See App. 33a)

We concede that Defense Counsel did the best he could, under the circumstances, to represent Petitioner during trial, however, Counsel acknowledges that local Counsel was imperative to a fair trial, in this case, due to incidences of patent unfairness and secreting of evidence that might have changed the verdict in this case. Defense Counsel was unfamiliar with the Dayton, Ohio area, and could not do very much to secure the presence of witnesses, intentionally, excluded by the government. The Court had given us a mandate to secure local Counsel and be ready for trial April 17, 1968. We could not secure other local Counsel that would be ready to proceed within a week of trial.

6. Replying to Petitioner's argument Number 6, we do not believe that public policy outweighs an accused's right to a fair trial. A trial is an adversary proceeding, which of course, means nothing if an accused is denied an opportunity to examine evidence presented in Court, to verify its authenticity. The trial Court forced us to take the agents word and leave it at that, concerning proof of an essential element of the crime charged. (See T. 143)

There was no claim that this was privileged matter. The agent classified this information as being "confidential" as does Appellee's Counsel. Confidential business information is not privileged and is subject to discovery and inspection. (See *U.S.* v. *Aluminum Company of America,* 232 Fed. Supp. 644; Fed. Rules of Criminal Procedure 16, 26 and 57b; discovery and inspection allowed on doctrine of "inherent power" in *Peek* v. *U.S.,* 321 F. 2d

934 and *Shores* v. *U.S.*, 174 F. 2d 838; physical examination allowed of a prosecuting witness in a rape case in *People* v. *Preston*, 19 Cal. App. 675, 127 P. 660, 664; 6 Wigmore, Evidence 395; Inspection allowed at trial in *Gordon* v. *U.S.*, 344 U.S. 414, 417, the Court applied rule 26; where prejudice can be shown by refusal to grant discovery and inspection at trial, new trial should be granted. *State* v. *Haas*, 188 Md. 63, 51 A. 2d 647, 649.

We do not believe that an accused must show a favorable result from discovery and inspection, to secure his constitutional right to examine evidence against him at trial, as Appellee's Counsel suggests. This can only be determined by inspection.

Counsel argues that we did not claim that the serial number presented in Court by the agent was erroneous. Obviously, we could not, because we did not know. The Court prevented us from making this determination, erroneously, as a matter of law. Knowing where the serial number came from, certainly would have given us an opportunity to make a physical examination to see whether the agent told the truth. Also, two Dayton Police Officers assisted in obtaining the alleged serial number, but they were not called as witnesses. (See T. 143).

7. In argument 7, Counsel says he sees no possessory interest in Petitioner which permits him to claim an illegal search and seizure. If this statement is true, then an automatic reversal of the conviction is in order, because government Counsel below argued that the basis of the charges and his demand for conviction was predicated upon "unlawful possession" by the Defendant. (See T. 174, 175; App. 25a, 27a) Nevertheless, we believe the cases cited in our original brief clearly support our view, in this respect.

CONCLUSION

For the additional reasons noted, we confirm our prayer that the Writ of Certiorari be granted.

Respectfully submitted,

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